United States Department of Labor
800 K Street NW, Suite 400N
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: JANUARY 20, 1998

Case No: 96-INA-500

In the Matter of:

Emmanuel & Joan De Vera,
Employer,

on behalf of:

Rosita L. Cruz,
Alien

Appearance: Richard B. Marasigan Esq.,
Marasigan & Associates

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

James W. Lawson
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Rosita L. Cruz by Emmanuel & Joan De Vera under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) denied the application, the Employer requested review pursuant to 20 CFR §

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

656.26.[2] Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On December 21, 1994, the Employer, which is a household, applied for labor certification to enable the Alien, a Filipino national, to fill the position of "Cook/Tutor(Live-In)." The position was classified under DOT Occupational Title No.099.227-010, Children's Tutor (domestic ser.)." The Employer described the job as follows:

> Help children w/ school work. Teach children rudiments of Philippine national language-Filipino- & culture. Prepare & cook meals for family esp. dinner.

The educational requirement was a Bachelor's Degree in Elementary Education. The application also specified 2 years experience in the job offered or in the related occupation of elementary school teacher plus the following Special Requirement:

> Must speak & write Filipino; Knowledge of Philippine culture;' Must speak & write English & non-smoker in workplace.

No U. S. workers were referred for the position.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration of the U.S. Department of Labor.

Notice of Findings, Rebuttal, and Final Determination. On October 24, 1955 the CO issued a Notice of Findings (NOF) notifying the Employer of DOL's intention to deny the application on the basis of unduly restrictive job requirements. On October 24, 1995, citing the DOT, the CO denied certification because

> "The normal requirements for the occupation of Children's Tutor are six months to one year combined education, training and experience."

Appeal. On August 17, 1996, the Employer appealed the CO's denial of alien labor certification contending that the CO failed to take into account the special circumstances of the case, namely that:

> the husband/employer is of Filipino ancestry and the kids are adoptive children from the Philippines. To aspire to have the children learn and be taught the rudiments of education, Philippine culture, Filipino language, and instilling discipline while both parents are at work, both regular and overtime, it is respectfully submitted is neither an excessive, unreasonable or unfounded requirement.

DISCUSSION

In summary, the panel has reviewed the CO's denial of certification and concluded that the CO correctly denied certification on his findings that

> ...requirements over and above those defined in the DOT are considered excessive and must be supported by evidence of business necessity.
>
> You have not provided any documentation that an applicant meeting the DOT standard would be unable to perform the duties of this position

and

> You have not documented why the performance of the stated job duties require [the education and experience claimed necessary].

Since the Employer's job requirements are in excess of the DOT for the position of Children's Tutor, the CO correctly required Employer to establish the business necessity. While the

Employer has indicated his personal preference, he has failed to document the business necessity.

ORDER

The Certifying Officer's denial of labor certification is hereby **Affirmed**.

For the Panel:

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James W. Lawson
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.